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Supreme Court, U.S.
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No. 04-530

IN THE

Supreme Court of the United States

PAUL NAGY,

Petitioner,

v.

FMC BUTNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

JEFFREY S. BROMME
Counsel of Record
RICHARD KORNYLAK
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-6254

Counsel for Petitioner

193477

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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Petitioner Paul Nagy files this Reply Brief in further support of his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit (the "Petition"), and in response to the brief of Respondent FMC Butner opposing the Petition (the "Respondent's Opposition").

I. SECTION 1915(g) PROVIDES NO BASIS FOR DENIAL OF THE PETITION

The Respondent argues that (i) Mr. Nagy already has accrued at least three dismissals, or "strikes," for reasons stated in 28 U.S.C. § 1915(g) and that (ii) this Court should take judicial notice of this and deny the Petition on that basis. The Respondent argues that even if this Court were to reverse the Court of Appeals, an action that ultimately would result in the remand of Mr. Nagy's case to the District Court, the District Court would then take notice of Mr. Nagy's prior "three strikes" and dismiss the case. Thus, according to Respondent, "petitioner cannot obtain meaningful relief from this Court." Resp't Opp'n at 10.

Respondent should not be permitted to raise this new argument. Respondent could have made this argument in the Court of Appeals, but did not. Instead, Respondent fully litigated in that court only the question whether small claims having arguable legal and factual merit are nevertheless "frivolous" under 28 U.S.C. § 1915(e)(2). Having obtained victory below, the Respondent, with its newly asserted position, now would block Mr. Nagy's opportunity for further review of the Fourth Circuit's decision in this Court.

Respondent has cited no case or other authority supporting this tactic.

Section 1915(g), upon which Respondent's argument relies, is not jurisdictional. *See Pigg v. FBI*, 106 F.3d 1497, 1497 (10th Cir. 1997) ("Section 1915(g) is not a jurisdictional limitation but merely requires the full prepayment of fees where the conditions of the statute are met."); *Garcia v. Silbert*, 141 F.3d 1415, 1417 n.1 (10th Cir. 1998) (quoting *Pigg*); *McDowell v. Del. State Police*, 88 F.3d 188, 191 (3d Cir. 1996) (payment of filing fee is not jurisdictional). The provision's language regarding "three strikes" as a bar to further *in forma pauperis* litigation is pellucid, but other mandatory language in the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134 ("PLRA") – namely, the requirement that a prisoner exhaust his administrative remedies before filing suit, 42 U.S.C. § 1997e(a) – is subject to waiver. *See Perez v. Wis. Dept. of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999) ("Defendants may waive or forfeit reliance on § 1997e(a), just as they may waive or forfeit the benefit of a statute of limitations."); *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) (PLRA's exhaustion requirement creates an affirmative defense that must be raised and proved by the defendant); *see also Andrews v. V.R. King*, 398 F.3d 1113, 1119-20 (9th Cir. 2005) (analogizing § 1915(g) to the PLRA's exhaustion requirement, and concluding that in both instances the Government has burden of establishing that plaintiff should not be allowed to proceed with his *in forma pauperis* suit). Here, Respondent has waived its reliance on Section 1915(g) by not raising it below. If the case ends now, with no review of the merits of the Court of Appeals' mistaken ruling, the Respondent will have been rewarded for withholding its assertion of its Section 1915(g) defense until after winning the first appellate round.

This Court should not dispose of Mr. Nagy's Petition on Section 1915(g) grounds for the additional reason that the District Court is better positioned to determine whether that provision applies and to afford Mr. Nagy his procedural rights. Courts in several circuits have stated that provision of detailed notice is essential to a determination that Section 1915(g) applies to previous dismissals. *See Snider v. Melindez*, 199 F.3d 108, 114 (2d Cir. 1999) ("The entry of a strike was obviously harmful to Snider's interests, yet he was given no notice and opportunity to be heard as to why, even if the dismissal was warranted, a strike might not be. Snider was entitled to such notice and opportunity in relation to the strike determination. . . ."); *Evans v. Ill. Dept. of Corr.*, 150 F.3d 810, 812 (7th Cir. 1998) (prisoner must be placed "on notice as to what the district court considered when denying his request to proceed *in forma pauperis*" and given "an adequate opportunity to contest the district court's three-strike determination"); *Andrews*, 398 F.3d at 1120 (prisoner should be "placed on notice of the potential disqualification under § 1915(g) by either the district court or the defendant"); *Koch v. Schuylkill County Prison*, 94 F. Supp. 2d 557, 565 (M.D. Pa. 2000) (prisoner is entitled to notice before his petition for a writ of habeas corpus is recharacterized as a complaint under 42 U.S.C. § 1983, as he thereby "risks suffering a 'strike' under the 'three strikes' provision governing prisoner litigation").

The Second Circuit has emphasized that "providing the adversely affected party with notice and an opportunity to be heard plays an important role in establishing the fairness and reliability of the order" denying *in forma pauperis* status. *Snider*, 199 F.3d at 113. Until such an opportunity is provided, it cannot accurately be predicted that Mr. Nagy inevitably will be barred from proceeding with his suit under Section

1915. The fact that the district court did not so much as mention Section 1915(g) may at least raise some doubt about the question.

In addition to providing detailed notice, a court must base its conclusion that Section 1915(g) applies to bar an *in forma pauperis* claim upon a careful review of the plaintiff's previously dismissed cases. *See Evans*, 150 F.3d at 812 ("[I]n the order denying leave to proceed *in forma pauperis* the district court must cite specifically the case names, case docket numbers, districts in which the actions were filed, and the dates of the orders dismissing the actions."); *Andrews*, 398 F.3d at 1121 ("[Section] 1915(g) should be used to deny a prisoner's *IFP* status only when, after careful evaluation of the order dismissing an action, and other relevant information, the district court determines that the action was dismissed because it was frivolous, malicious or failed to state a claim.").

The preference that district courts decide such matters in the first instance was expressed in *Boag v. MacDougall*, 454 U.S. 364 (1982) (per curiam), a case cited by Respondent in its Opposition. *See* Resp't Opp'n at 11 n.7. This Court in *Boag*, while recognizing its power to do so, declined to take judicial notice of previously filed actions that were not disclosed in the record. The Court stated, "[I]t does not appear from the papers before us that any such discretion [to take judicial notice of the actions] was exercised by *either the Court of Appeals or the District Court*." *Boag*, 454 U.S. at 365 n.* (emphasis added). Because it was "in no position to decide" whether the petitioner's "prior filings justify the conclusion that his action is frivolous or malicious," the Court concluded that a "question of that character must be addressed in the first instance by the District Court," and accordingly remanded the action for further proceedings. *Id.*

In sum, Section 1915(g) is not a compelling grounds for denial of Mr. Nagy's Petition. However, if the Supreme Court were to disagree with Mr. Nagy on this point, it is respectfully suggested that the proper outcome for the administration of justice would be to vacate the opinion of the Court of Appeals and remand the case to the District Court for the determination whether Section 1915(g) would bar Mr. Nagy's claim rather than allowing an appellate opinion to stand that, on the Respondent's new reasoning, should not have been delivered in the first place.

II. THE COURT OF APPEALS' DEFINITION OF "FRIVOLOUS" IMPROPERLY FOCUSES ON THE SIZE OF THE CLAIM

Respondent's Opposition fails to acknowledge that the result of the Fourth Circuit's test will be to almost certainly doom prisoner property claims. For all the discussion in the Opposition and in the Court of Appeals' decision about a "multi-factor test," the fact remains that the *only* factor that the District Court considered in this case was the size of Mr. Nagy's claim. It was nothing more than speculation for the Court of Appeals to divine what other matters may have been within the mind of the District Court when dismissing Mr. Nagy's claim, and now the Respondent endorses this exercise in speculation. Resp't Opp'n at 9.

The Respondent asserts that the Court of Appeals considered not only the small size of the claim, but also "other factors – including the lack of evidence that laundry staff had failed to follow standard procedures." *Id.* However, any reliance on the state of the evidence is completely misplaced, as the case was dismissed before any discovery commenced, indeed, before responsive pleadings were filed.

Mr. Nagy had no opportunity to adduce *evidence* that the laundry staff had failed to follow procedures, much less litigate the efficacy of any such procedures. Yet the Court of Appeals and Respondent cite the absence of that evidentiary record, in combination with the size of his claim, as practically decisive in justifying dismissal of his lawsuit. In reality, however, the District Court relied only upon the small size of his claim, citing the case of *Deutsch v. United States*, 67 F.3d 1080 (3d Cir. 1995), in which small claims are presumptively frivolous.

As can be seen from its first application in the Court of Appeals' opinion, the so-called "multi-factor" test is a chimera. It quickly reduces into a dominating focus on the size of the claim. Facing a small claim, courts will all too easily posit the existence of other factors supporting dismissal, even in the absence of evidence bearing upon them. In application, the new test for whether a prisoner's claim is "frivolous" will simply mean that small, meritorious claims are barred from federal court. And because prisoners do not have substantial property in prison, all, or virtually all, of their property claims will be small, meaning that under the Court of Appeals' test, prisoner property claims will no longer be heard in federal court. This policy choice, if it is to be made at all, should be made in the legislative branch, not by the courts.

In this connection, it is worth observing that, contrary to Respondent's characterization, Mr. Nagy does not argue that this Court's decisions in *Neitzke v. Williams*, 490 U.S. 319 (1989), and *Denton v. Hernandez*, 504 U.S. 25 (1992), "purport[ed] to render its description of frivolous cases 'definitive' or exhaustive." Resp't Opp'n at 7. This Court obviously can further elaborate on the definition of

"frivolous," and lower courts are free to do so as well, provided that they do so within the confines of this Court's doctrine. However, under the Court of Appeals' new test, Mr. Nagy's claim is "frivolous," even though there is no dispute that it is factually plausible and has a basis in law. It is not possible to square that outcome with this Court's holdings in *Neitzke* and *Denton.*

III. THE PRISON LITIGATION REFORM ACT SUPPLIED THE ECONOMIC DISINCENTIVE TO SUIT WITHOUT BARRING SMALL MONETARY CLAIMS

The Respondent's Opposition emphasizes the abstract principle that the PLRA was designed to make it more difficult for prisoners to sue. But this general purpose, indisputable though it may be, does not mean that *any* test developed by the courts to block prisoner litigation is therefore permissible. The word "frivolous" in that statute must be interpreted in the context of the statute itself and consistently with this Court's precedents.

As discussed in the Petition, prior to the PLRA two strands of thought developed as to how best to address burgeoning *in forma pauperis* prisoner litigation. First, there was the approach of the *Deutsch* court, in which the size of the claim in relation to the filing fee became the predominating consideration. Where the claim was smaller than the filing fee, the claim would be presumed to be frivolous. On the other hand, suggestions were made that the solution to *in forma pauperis* litigation, which lacked the restraining counterbalance of a filing fee, would be to simply require prisoners to pay the filing fee.

Faced with these alternative solutions, Congress elected in the PLRA to require *in forma pauperis* prisoner litigants to pay the filing fee over time. Thus, after the PLRA, the prisoner always is assessed the filing fee. Congress could easily have opted for the *Deutsch* approach, but it did not.

In choosing as it did, Congress considered "that the proliferation of prisoner litigation was due significantly to the lack of economic disincentives to filing meritless cases." *Roller v. Gunn*, 107 F.3d 227, 230-31 (4th Cir. 1997). The requirement that prisoners qualifying for *in forma pauperis* status pay the entire filing fee – albeit on a deferred basis – was designed to "[r]equir[e] prisoners to make economic decisions about filing lawsuits. . . . If a prisoner determines that his funds are better spent on other items rather than filing a civil rights suit, he has demonstrated an implied evaluation of that suit that the courts should be entitled to honor." *Id.* at 233 (quotation omitted). In other words, the PLRA "simply force[s] the prisoner to weigh whether the 'merit of the claim' was worth 'the cost of pursuing it.'" *Id.* at 232. Thus, the PLRA imposed the financial incentive designed to discourage small-stakes claims. Yet, conspicuous by its absence in the PLRA is any minimum claim amount requirement. Congress did not, in the PLRA, alter the Supreme Court's definition of "frivolous" or in any other way suggest that a "minimum amount in controversy" requirement existed within either the *in forma pauperis* statute or in the PLRA itself.

* * *

For the foregoing reasons, in addition to those in the Petition, Mr. Nagy respectfully requests that this Court grant the Petition.

Respectfully submitted,

JEFFREY S. BROMME
Counsel of Record
RICHARD KORNYLAK
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-6254

Counsel for Petitioner